Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-752**

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

*vs.*

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE, AND
DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR RESPONDENTS

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## BRIEF FOR RESPONDENTS

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### QUESTIONS PRESENTED

I.

Whether the First Amendment Religion Clauses bar the National Labor Relations Board from asserting jurisdiction over and adjudicating disputes between the Catholic Bishop of Chicago and the lay faculty employed by the Catholic Bishop at two minor seminaries that exist to educate and train the clergy of the Roman Catholic Church.

II.

Whether the First Amendment Religion Clauses bar the National Labor Relations Board from asserting jurisdiction over and adjudicating disputes between the Diocese of Fort Wayne-South Bend, Inc. and the lay faculty employed at five Roman Catholic diocesan high schools.

III.

Whether the National Labor Relations Act applies to private religious schools.

## STATEMENT

Respondents, the Catholic Bishop of Chicago and the Diocese of Fort Wayne-South Bend, Inc., operate religious schools for the education of Catholic young people. The Government's case against the Catholic Bishop of Chicago concerns two minor seminaries, Quigley Preparatory Seminary North and Quigley Preparatory Seminary South, located in Chicago, Illinois. (Pet. App. 53a)[1] The Government's case against the Diocese of Fort Wayne-South Bend, Inc. concerns five diocesan high schools in Indiana. (Pet. App. 69a) While the Respondents' schools share a religious mission, the Quigley seminaries are special schools that exist to train and nurture the clergy of the Roman Catholic Church. (A. 49)

1. "Pet. App." refers to the appendix attached to Petitioners Petition for *Writ of Certiorari* filed November 25, 1977. "A" designates the Appendix proferred by the Petitioners and Respondents pursuant to United States Supreme Court Rule 36. "R" denotes the Record as enumerated under the Board's Rule 17(b) F. R. A. P., a certified list of documents comprising the record which has been transmitted to the Clerk of the Court pursuant to United States Supreme Court Rule 25(1). As used herein, the abbreviation "Tr." refers to the transcript of proceedings before the Board in either the Catholic Bishop of Chicago representation proceeding, 13-RC-13402 or in the Fort Wayne-South Bend Diocese representation proceeding 25-RC-5984.



## I. THE QUIGLEY SEMINARIES

### A. The Seminary System

The Roman Catholic Church requires its bishops to maintain seminaries to prepare young men for the priesthood. (A. 22, 40) In the Archdiocese of Chicago, the Quigley preparatory seminaries are the high school department or the minor seminaries of the Catholic Bishop's seminary system. (A. 48, 58) Upon graduation from the Quigleys, the seminarian matriculates to Niles College of Loyola University and then to St. Mary of the Lake Seminary for his major seminary training. (A. 52, 55-56) This seminary system is fully accredited and recognized as such by Catholic Church governing bodies throughout the world. (A. 52-54; Emp. Exs. 8, 9, 10)[2]

Seminaries are the lifeline of the Church, and the Church has assiduously protected its right to operate them without outside

2. Employer's Exhibit 8 is a portion of the "Official Catholic Directory" for 1974; the Directory is compiled under the supervision of the United States Catholic Conference ("U. S. C. C.") and the National Conference of Catholic Bishops ("N. C. C. B."), which are the supervising authorities of the Roman Catholic Church in the United States. The Archdiocese of Chicago seminaries, including Quigley North and Quigley South, are listed on page 174 under the heading "Seminaries". (Tr. 168) Parochial high schools are listed elsewhere in the Directory under the heading "High Schools". (Tr. 169)

Employer's Exhibit 9 is a Directory entitled, *Seminaria Ecclesiae Catholicae* [Seminaries of the Catholic Church]; it is published by the *Sacra Congregatio de Seminaries et Studiorum Universitatibus* [Sacred Congregation of Seminaries and Higher Studies and Universities]. The Congregation is the official body of the Catholic Church which supervises the administration of seminaries throughout the world. (Tr. 171) The Directory is an official listing of all Roman Catholic seminaries. (Tr. 172) Quigley North and Quigley South are listed on page 1313 of this Directory. (Tr. 172; Emp. Ex. 9)

Employer's Exhibit 10 is a Directory prepared under the supervision of the U. S. C. C. and N. C. C. B., which also contains statistical information regarding Roman Catholic seminaries in the United States. The Quigleys are listed on pages 21 and 22.

interference. Reverend Keating,[3] who testified before the Board, stated:

> . . . I think the Church historically certainly has looked upon its control over seminaries as really control over its lifeline. To a great extent, the growth and the vitality, and in some cases the very survival of the Church, depends upon the Church's responsibility over seminaries, the right to operate them.
>
> To give an example to show this intense concern of the Church, in countries where perhaps a hostile government threatens to take control of the seminaries, the Church is quick to seek negotiations at the highest level with that government, and indeed has concluded treaties, called concordats, with various countries. . . . [A] recurrent item in concordat agreements is the freedom to operate seminaries, to establish them, to supervise them, to control the curriculum, personnel of seminaries. (A. 43)

Where governments have refused to respect the independence of seminaries, the training of priests has been "obliterated." (A. 44)

There are 87 minor seminaries in the United States with a total enrollment of approximately 6,928. (Emp. Ex. 10) Quigley North has an enrollment of 276, and Quigley South, the largest minor seminary in the United States, has an enrollment of 895. (A. 102)

Quigley North's proposed budget for the 1974-75 fiscal year was approximately $290,000.00. (Emp. Ex. 17 at 2) Of that sum, $26,000.00 was designated for the purchase of out-of-state goods. (Emp. Ex. 73) Quigley South's proposed budget for the 1974-75 fiscal year was approximately $930,000.00. (Emp.

3. Reverend John R. Keating, S. T. L., J. C. D., is Co-Chancellor of Archdiocese of Chicago. (Tr. 72) Father Keating is the Archdiocese's counsel on Church law. (Tr. 75) He is also a consultant to the United States Bishops' Committee for Canonical Affairs. (Tr. 73) Reverend Keating graduated from Quigley, St. Mary of the Lake Seminary, and the Pontifical Georgian University of Rome. (Tr. 73-74)



Ex. 16 at 3) In the 1973-74 fiscal year, Quigley South's total expenses were approximately $960,000.00, only $39,500.00 of which was expended on goods received directly from sources outside the State of Illinois. (Emp. Ex. 72) In 1974, the Bishop's subsidies to the Quigley amounted to approximately $193,000.00 for the operation of Quigley North and approximately $455,000.00 for the operation of Quigley South.[4] (Emp. Ex. 15 at 29)

### B. The Evolution of the Modern Seminary

Though its essentials can be traced to the time of Christ, the Council of Trent marks the advent of the modern seminary.[5] (A. 18) In 1563, the Council issued canons that required each bishop to maintain a seminary and directed that priests be given a secular as well as a religious education. (A. 22-23; Emp. Ex. 1, at 175-76) The Council further mandated that bishops retain exclusive authority over the training of priests so as to maintain the purity of the faith and prohibited bishops from relinquishing this authority to others. (A. 23) The bishop's authority extended to curriculum, selection of teachers, and the general course of training. (A. 23; Emp. Ex. 1, *e.g.*, at 175, 176)

Saint Vincent DePaul established the first minor seminary in 1642. (A. 24) The early minor seminary accepted boys at 12 or 13 years of age and gave them a six-year course of study in both secular and religious subjects to prepare them for further clerical education. (A. 24-25) The minor seminarian would matriculate to a "major seminary" for six years of advanced theological study.

4. The Board's minimum jurisdictional standard for private educational institutions is $1,000,000.00, 29 C. F. R., Part 103, Subpart A, § 103.1 (1970). The operating budgets for Quigley North and Quigley South meet that standard only when totalled together as the Board has done here. (Emp. Ex. 17 at 2; Emp. Ex. 16 at 3)

5. The Council of Trent took place from 1545 to 1563. A Council is a meeting of Catholic bishops with the Pope to formulate law and doctrine for the Catholic Church. (Tr. 30)

Seminaries have continued their development into the Twentieth Century. In 1915, the Congregation for Seminaries[6] was formed to supervise Catholic seminaries throughout the world and to establish uniform curriculum, faculty and disciplinary standards. (A. 26) Three years later, the modern Code of Canon Law was promulgated.[7] (A. 27) The Code requires that seminarians must receive a high school education comparable to the secondary education afforded to students who aspire to secular vocations. (A. 36; Emp. Ex. 2, Canon 1354) The Code, following Church legislation through the ages, entrusts the supervision and direction of seminaries to the bishop. (Tr. 84-86; *e.g.*, Emp. Ex. 2, Canon 1351)

In 1965, the Second Vatican Council issued the *Decree on Priestly Formation* to conform training for the priesthood to the contemporary needs of the Church. (Emp. Ex. 3) The *Decree* emphasizes that seminarians must receive a secular, as well as a religious education, to enable them to communicate with and to lead the people of their time. (A. 41) Responding to rising seminarian attrition, the *Decree* directs that seminary studies should be organized so that students can continue their education outside the seminary should they decide not to become priests. (Tr. 103)

Pursuant to the *Decree on Priestly Formation*, the episcopal conference of the United States[8] developed and published *The*

6. A Congregation is one of the major administrative divisions of the Roman *Curia*. (Tr. 41, 105) It is subordinate only to the Pope and reports to him regarding a specific area of Church administration. The Congregation for Seminaries is now called The Sacred Congregation for Catholic Education. (Tr. 105-06)

7. References to the Code of Canon Law are taken from Bouscaren and Ellis *Canon Law: A Text and Commentary* (1946 Bruce Publishing Co., Milwaukee).

8. A national "episcopal conference" is comprised of the Catholic bishops in a particular nation. In the United States, the episcopal conference is referred to either as the National Council of Catholic Bishops ("N. C. C. B.") or the United States Catholic Conference ("U. S. C. C."). Subject to Vatican approval, episcopal conferences have authority to legislate for Catholics in their particular country. (Tr. 99)



*Program of Priestly Formation of the National Conference of Catholic Bishops, U. S. A.* (A. 41; Emp. Ex. 4) The *Program* emphasizes that seminaries must provide a quality secular education and recommends they seek accreditation. (A. 44-45; 111-12; Emp. Ex. 4, Paragraphs 104, 293, 353, 364) Accreditation is discretionary with each bishop and should not be sought if it would detract from the seminary's purpose—the training of priests. (*E.g.*, A. 42-43, 49, 157-59)

### C. The Quigley Curriculum

Although the Quigley curriculum has changed from time to time, seminarians have always been given a secular as well as a religious education. (A. 59, 101, 103) The secular curriculum at both institutions is comparable to the course of study offered at secondary schools throughout the State of Illinois. (A. 80, 101)

In the first half of this century, Quigley students led a relatively sheltered life. (A. 60-61) In acordance with the *Decree on Priestly Formation*, these restrictive policies have been relaxed to provide the contemporary seminarian with a more worldly environment. (A. 61-62) To foster the seminarians' ability to achieve meaningful relationships with the laity they may someday serve, contact between the Quigley seminarians and their noncleric peers of both sexes is now permitted. (Tr. 121-23) Seminarians, however, are counselled that the day will come when they must make the ultimate commitment to ecclesiastical pursuits. (A. 62)

The Quigleys have special Formation Departments for religious instruction and seminarian character development. (A. 87, 102) These departments are the "heart of the Quigleys' operations." (A. 99, 102) They administer liturgical programs, an apostolic program, and retreats to prepare seminarians for a life of service. (A. 80-81, 103-04) Students must attend between seven to ten special annual liturgical events; numerous

additional liturgies are performed in each formation class. (Tr. 561) Through the apostolic program, students perform charitable and religious services. (A. 80-81, 97-98, 103) Retreats, lasting from one to three days, afford seminarians the opportunity to reflect on the spirituality of their lives. (A. 104) Catholic high schools do not have Formation Departments, and their religious programs are not as extensive as those at the Quigleys. (A. 78-79, 88)

Seminarians are evaluated annually on their potential for the priesthood. (Emp. Ex. 37) Seminarians who are judged to be unsuited to the priesthood may be and are dismissed even though they have satisfactory academic and disciplinary standings. (A. 86, 106)

### D. Quigley Admissions

Today, there is a shortage of priests in the Archdiocese of Chicago and in most dioceses throughout the world. (A. 63) Historically, large numbers of seminarians have withdrawn from priestly education before ordination. (A. 49) In recent years, attrition at Catholic seminaries, including the Quigleys, has been particularly high. (A. 58, 62) To meet these problems and to conform the Quigleys' program of instruction to the *Decree on Priestly Formation* and the *Program of Priestly Formation,* the Catholic Bishop approved and adopted the *Archdiocese of Chicago Statement of October 5, 1970.* (A. 57-58; Emp. Ex. 5)

Prior to the *Statement of October 5,* only young men who had a positive desire to be priests were admitted to the Quigleys. (A. 57) The *Statement of October 5* now permits not only young men who have a positive desire to be priests but also young men who, in the opinion of their pastors, are capable of developing that desire to be admitted to the Quigleys. (A. 57; Emp. Ex. 5 at 2) Catholic high schools do not maintain such admission requirements. (Tr. 437, 654-55)



Despite this change in admissions policy, the *Statement* emphasizes that the Quigleys are to retain their ecclesiastical character as seminaries. *Statement of October 5, 1970* (Emp. Ex. 5, at 2):

> [T]he public image of Quigley North and Quigley South emphasize the fact that they are contemporary seminaries primarily concerned with the development and encouragement of vocations to the priesthood.

and (Emp. Ex. 5, at 3):

> The practical meaning that this new policy will have will be the meaning that the faculty gives it. The consultants do not wish the Quigleys to become ordinary high schools. They have expressed their confidence that the members of the faculty will keep in practical focus the ultimate orientation of the minor seminaries toward the priesthood.

### E. The Quigley Faculty

There are 18 full-time faculty members at Quigley North. Eleven are priests, one is a nun, and six are lay teachers. (A. 86; Emp. Ex. 34) At Quigley South, there are 12 priests, two nuns and 40 lay teachers. (Emp. Ex. 60) All full-time faculty members receive a salary, health and accident insurance, and medical and retirement benefits. Upon fulfillment of certain conditions, faculty are granted tenure. (A. 143-54)

The Catholic Bishop of Chicago maintains an Archdiocese of Chicago Board of Conciliation and Arbitration which mediates teacher grievances. (A. 150-152)

## II. THE FORT WAYNE-SOUTH BEND DIOCESAN SCHOOLS

The Diocese of Fort Wayne-South Bend, Inc., a not-for-profit religious, educational and charitable entity incorporated under the laws of Indiana, is a diocese of the Roman Catholic Church. (A. 159) The Diocese administers five high schools to teach

and raise the youth of the Catholic Church in accordance with the tenets of the Roman Catholic Faith. (A. 176; Canon 3362) The students are Roman Catholics with some exceptions. (Tr. 85-86)

All five of the Diocese's high schools operate at a substantial deficit, and their budget deficits must be met by direct contributions from the parishes in the Diocese.[9] (Tr. 9, 38-42) (Educational Policies ¶¶ 3252, 3291, 3414) The proposed total annual operating budgets for 1975-76 school year for the five high schools were respectively, $72,000.00 (Huntington Catholic High School); $485,830.00 (Marion High School); $640,950.00 (Bishop Luers High School); $685,245.00 (St. Joseph High School); and $707,655.00 (Bishop Dwenger High School).[10] (Tr. 38-39)

In 1974 the Diocese employed a faculty of 207 full-time and part-time teachers to teach at these schools. Twenty-five mem-

9. The budgets of the five schools indicate that each high school operates at a susbtantial deficit:

> "Q. [By Mr. O'Dowd]: Would you want to indicate what the budgets are for each of the five high schools?
>
> A. Okay. The Bishop Dwenger High School, 1975-76 school year budget, estimated enrollment 1,025 students. Total expenses $707,655. Total deficit, $200,555.
>
> The proposed annual budget for 1975-76 Bishop Luers High School, estimated enrollment 1,000; total expenses $640,-950; total deficit $173,750.
>
> Proposed annual budget for Marion High School 1975-76, estimated enrollment 550 students; total expense $485,830; total deficit $163,450.
>
> St. Joseph High School, proposed annual budget 1975-76, estimated enrollment 1,020 students; total expenses $685,245; total deficit $159,165.
>
> Huntington Catholic High School, estimated enrollment 160; total expenses $72,000 and expected deficit, $18,000.
>
> Q. Would you be able to give us an approximate deficit figure for the five high schools?
>
> A. If I add them up. About $750,000, somewhere around in there." (A. 166)

10. Only by combining the operating budgets of these schools does any of the five schools satisfy the Board's minimum jurisdictional standards of $1,000,000.00 for private educational institutions. See 29 C. F. R., Part 103 Subpart A § 103.1 (1970).



bers of the faculty were associated with religious orders of the Roman Catholic Church; the remaining teachers are lay persons. (R. 2, Exhibit I, Affidavit of Father James F. Seculoff)

By canon law, the Bishop in the Diocese of Fort Wayne-South Bend, as the bishop in every Diocese, "must see . . . that the schools for children and young men and women are conducted according to the principles of the Catholic religion." (Canon 336, Section 2) Canon 1381 provides:

> *Section 1.* The religious teaching of youth in all schools whatsoever is subject to the authority and inspection of the Church.
>
> *Section 2.* The local Ordinaries (Bishops) have the right and duty to see that nothing is taught or done contrary to faith or good morals in any of the schools of their territory.
>
> *Section 3.* They have, moreover, the right to approve the teachers of religion and the books, and to demand that, in the interest of religion and morals, teachers and books be replaced.

In the past, the Diocese relied on priests, brothers and nuns to teach in its high schools, but today a greater reliance is placed on the lay faculty. (Tr. 58) All teachers, whether lay or associated with a religious order, must teach their students the gospel of Christian love and unity. The Educational Policies Handbook admonishes:

> Perfect schools are the result, not so much of good methods as good teachers who are thoroughly prepared and well-grounded in the matter they have to teach; who possess the intellectual and moral qualifications required by their important office; who cherish a pure and holy love for the youths confided to their care because they love Jesus Christ and His Church, of which there are the children of predilection; and who have therefore, sincerely at heart the good of the family and country. They work directly under the principal of the school. Their intellectual and moral qualifications must be adequate to the great task entrusted to them. (A. 189)

It is the duty of every teacher "to see that prayers are said reverently and at the times indicated by the principal." (A. 196)

## III. PROCEEDINGS BELOW

### A. Before the Board

The Quigley Education Association, an affiliate of the Illinois Education Association, and the Community Alliance for Teachers of Catholic High Schools (the "Unions") filed separate representation petitions with the National Labor Relations Board in 1974. (Pet. 6) The Chicago Bishop and the Fort Wayne Diocese contended that the Board had no jurisdiction over their schools and that the Board's intervention into the internal affairs of these religious institutions violates the First Amendment. The Board responded that jurisdiction would lie if the schools were "merely religiously associated", but as a matter of discretion it would decline jurisdiction if the schools were "completely religious."

The Quigley jurisdictional hearing prompted searching inquiries into the beliefs and traditions of the Roman Catholic faith. Witnesses, for example, were repeatedly interrogated by counsel for the Union and the Hearing Officer as to whether "the Archbishop of Chicago [is] performing his functions correctly" (A. 33); whether a priest was "less of a priest" because he did not attend one of the Quigleys (A. 67); whether a mass was "less valid because it does not occur in a chapel" (A. 96); and whether "immortality" could be defined. (A. 39) Extensive testimony was taken concerning the Quigleys and the role and history of seminaries in the Roman Catholic Church.

Without discussion of a single First Amendment principle, the Board decided that the Quigley seminaries were not "completely religious", and therefore the Union could bring the case before the Board. (Pet. App. at 58a) To support this conclusion, the Board emphasized:

1. That prior to October, 1970, the Quigley seminaries admitted only students who had a positive desire to be priests.



2. That since October, 1970, the Quigley seminaries have admitted not only students who have a positive desire to be priests but students who, in the judgment of their pastors, have the potential to be priests.
3. That prior to 1970, 25-30 percent of the Quigley graduates matriculated to further seminary instruction, while since that date only 16 percent of the graduates have so advanced.
4. That the Quigleys hold themselves out to potential students as secondary schools "to educate young men of quality character, idealism, and intelligence for dedicated Christian lives of service to others, including, hopefully, vocations for many to the priesthood and religious life."

No consideration appears to have been given to the Quigley seminaries' special role in the Roman Catholic Church.

The Board ruled against the Fort Wayne Diocese in more summary fashion. The Board's Regional Director dismissed the Diocese's constitutional argument in a single sentence in a footnote. (Pet. App. at 93a n. 2) The full Board denied review by telegram. (R. 7)

The Board designated two bargaining units of lay faculty at the schools (46 teachers at the Quigleys and 182 teachers at the Indiana schools) and conducted elections. The Unions won the elections, and the Board certified them as the exclusive bargaining agents of the lay teachers. After the Respondents refused to bargain, the Board filed unfair labor practice complaints against them, alleging violations of Sections 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). (A. 201, 217) The Respondents renewed their First Amendment objections, and the Board again summarily dismissed their constitutional claims, ordering them to bargain with the Unions. (A. 213, 225; Pet. App. 53a, 69a)

### B. Before the Court of Appeals

The Seventh Circuit denied enforcement. (Pet. App. 1a) The Court first found the Board's "completely religious—

merely religiously associated" standard unworkable, requiring searching inquiry into sensitive religious concerns:

> In our opinion the dichotomous "completely religious—merely religiously associated" standard provides no workable guide to the exercise of discretion. The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition. *See, e.g., Yoder, supra,* 406 U.S. 205. At some point, factual inquiry by courts or agencies into such matters would almost necessarily raise First Amendment problems. (Pet. App. 15a)

The Court concluded that, in any case, the Board abused its discretion in finding that the schools were not completely religious because, as this Court has reiterated time and again, these schools are "religion-pervasive institutions." *Meek* v. *Pittenger,* 421 U. S. 349, 366 (1975).

The Court then held that application of the Act to the Church's schools violated the First Amendment:

> A church which chooses to educate its own young people in schools which it is required essentially to finance without governmental aid should because of the essentially religious permeation of its curriculum be equally freed of the obviously inhibiting effect and impact of the restrictions of the National Labor Relations Act in conducting the teaching program of those schools. (Pet. App. at 46a)

This Court granted certiorari on February 21, 1978 to review these judgments. (A. 230)[11]

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11. Cases raising these same issues are pending in three circuits: In *Caufield* v. *Hirsch, appeal pending* Nos. 77-2021 and 77-1972 (3d Cir.) a federal district court enjoined the Board from asserting jurisdiction over Catholic schools in the Archdiocese of Philadelphia. In *Cardinal Timothy Manning* v. *NLRB,* No. 77-1286 (9th Cir.) and *Gordon Technical High School Directed by Congregation of the Resurrection* v. *NLRB,* No. 77-1583 (7th Cir.) the Church seeks review of Board decisions asserting jurisdiction over a Chicago Catholic high school and over all Catholic schools in Los Angeles.



## SUMMARY OF ARGUMENT

### I.

The First Amendment Religion Clauses bar the National Labor Relations Board from applying the National Labor Relations Act to the Chicago Bishop's minor seminaries and the Fort Wayne Diocese's Catholic high schools. The Board's "completely religious—merely religiously associated" jurisdictional standard violates the First Amendment, because the standard requires the Board to make excessive judgments about what is and what is not religious. The Board's application of that standard in this case, moreover, overruled the Church on the religious mission of Church schools and this Court's clear holdings that these schools were "religion-pervasive institutions." *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U. S. 696 (1976), *Meek* v. *Pittenger,* 421 (U. S. 349 (1975); *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).

Application of the Act to teachers at Catholic Church schools puts the Labor Board in the position of directing or influencing religious matters there. The Board has already become entangled in unfair labor practice adjudication at the Fort Wayne Schools and has even litigated the religiosity of a prayer. Such regulation will have a chilling effect that will prompt Church leaders to compromise their religious decisions to avoid confrontation with Government-certified unions and entanglement with expensive and protracted Government proceedings.

The cumulative impact of the Board's regulation of Church-teachers disputes will have a profound secularizing effect on the Church's schools. The Church, if this Court reverses the Seventh Circuit, will have to share its authority with a Government-certified union. Board certification violates the First Amendment, because it is the Government that now sanctions the union, bolsters its authority and affirmatively obligates the Church to negotiate over the operations of religious schools. And it is

Government that determines whether or not the Church has met its obligations under the Act. No Government interest will sustain this unprecedented intrusion into religious education.

II.

Congress did not intend for the Act to apply to private religious schools. When the Act was passed over 40 years ago, priests, nuns and brothers were charged with the Church's teaching mission and disputes between religious faculty and the Church were then and are now beyond the pale of civil authority. There is no "affirmative intent clearly expressed by Congress" to apply the Act to the Church's teachers and absent such a clear expression of congressional resolve, this Court should not construe the Act to approve the Board's newly-asserted right to intervene in Church schools. *McCulloch* v. *Socieded National de Marineros de Honduras*, 372 U. S. 10 (1962).

## ARGUMENT

The National Labor Relations Board seeks license to intermeddle with the teaching process at Church schools. The Quigley seminaries present the profound issue of whether the Board can intervene in teacher affairs at special religious schools that exist to train the clergy of the Poman Catholic Church. The Fort Wayne schools present the broader issue of whether the Board has jurisdiction over teachers at typical parochial schools. The Respondents have no anti-union animus. But they must protect their right to offer religious education and the right of their parishioners to attend Catholic Church schools. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925).

Originally, Catholic schools were almost completely staffed by nuns, brothers and priests, and the Church had no difficulty attracting young men and women to these religious callings. Interest in such vocations has, albeit temporarily, waned. But, the Church continues to educate its young in accordance with its



centuries' old traditions and has the laity now assisting in this sacred mission. The change from religious to partially lay faculties has imposed staggering new costs on the system. When the States sought to ease this burden, the courts raised the spectre of established churches and unlawful intrusion into the religious sphere. *E.g.*, *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). Now the Board has seized on this change in personnel to expand its jurisdiction. It has thrust itself more deeply into religious schools than the States ever dreamed of doing. It would be a tragic irony indeed if the courts were to stand back and permit the Board free rein in areas where they prohibited the States from the slightest entree.

We do not contend that all Government regulation of religious schools violates the First Amendment. The Government should and does make sure that religious education—and indeed religious worship—is carried on in safe structures, that teachers and students are not exposed to communicable disease, and that there be protection from fire and theft. Zoning, compulsory attendance, tax, civil rights and other regulations require more judgment in their application but are nonetheless permissible.

No single judicial formula neatly demarks the religious from the secular, but there are judicial touchstones against which to measure the legitimacy of Government-Church contacts. Whether we describe these touchstones as the "entanglement test," the "neutrality rule," or the balance of the "public interest" against the right to "free exercise", the principle common to them all is that the Government may not interfere with a religious institution in such a way as to direct or influence religious matters.

Application of this principle here requires affirmance of the Seventh Circuit.

## I. The Board's Jurisdictional Standard and Jurisdictional Inquiry in This Case Impermissibly Entangled the Government in Religious Schools.

The Board proclaims that it will not assert jurisdiction over "completely religious" private schools but will assert jurisdiction over schools that are merely "religiously associated." (Pet. App. 86a) This "completely religious"—"religiously associated" jurisdictional standard placed the religious content of the Church's schools on trial and immediately thrust the Board into questions of religious doctrine, mission, and values. The Quigley jurisdictional hearing, for example, is replete with striking examples of the kind of religious inquiries this Court has sought to prevent:

> Q. [By Union Counsel] Now, as a student of these particular documents [containing the church law regarding seminaries] which you have testified to, is the Archbishop of Chicago Archdiocese performing his functions correctly in the operation of the seminaries in this Archdiocese? (A. 33)
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> Q. [By Hearing Officer] Did you hear my question? I merely asked for a short definition possibly of immorality. (A. 40)
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> Q. [By Union Counsel] . . . If two men are ordained from St. Mary of the Lake and one of them went to or through Quigleys, one of the Quigleys, but the other one did not, is there anything in canon law which would make the one which did not go through the Quigleys any less of a priest? (A. 67)
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> Q. [By Union Counsel] Now, going back to the liturgy programs, do you know whether or not parochial high schools ever celebrate mass in an auditorium of any kind?
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> A. [By Msgr. O'Donnell] Yes, they do.



> Q. Is it a less valid mass because it does not occur in a chapel? (A. 96)
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> Q. [By Hearing Officer] Now, we have had quite a bit of testimony already as to liturgies, and I don't want to beat a dead horse; but let me ask you one question: If you know, how many liturgies are required at Catholic parochial high schools; do you know?
>
> A. [By Msgr. O'Donnell] I think our first problem with that would be defining liturgies.
>
> That word would have many definitions . . . A liturgy can range anywhere from the strictest sense of the word, which is the sacrifice of the Mass in the Roman Catholic terminology. It can go from that all the way down to a very informal group in what we call shared prayer.
>
> Two or three individuals praying together and reflecting their own reactions to a scriptural reading. All of these—and there is a big spectrum in between two extremes—all of these are popularly referred to as liturgies.
>
> Q. I see.
>
> A. Now, possibly in repeating your question, you could give me an idea of that spectrum, I could respond more accurately.
>
> Q. Well, let us stick with formal masses. If you know how many masses are required at Catholic parochial high schools? (A. 96)
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> Q. [By Union Counsel] Now, you said retreats are essentially a religious experience. Your use of the word 'religious' was a broad—in a broad sense was it not?
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> A. [By Rev. Fahey] (No response) (A. 112)
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> • • • • •
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> Q. [By Union Counsel] What is a positive value in the priesthood?
>
> A. [By Mr. Wych] A positive value in the priesthood would be Christian morals, belief in Catholic Church, leading what would be classified as a Christian life, not necessarily being religious in the term of walking around with a rosary.

Q. All right, could you for the record give us other examples of what you mean by a Christian life? Do you use that expression, 'Christian life'?

A. Yes, attending Mass on Sundays, possibly with reference to the form that the pastor would submit, being an altar boy for a specific Mass, being a patrol boy, helping other students in the grammar school, being an example to other students. . .

Q. Is there a written document or set of instructions which are sent to pastors which tell them what the school means by positive value in the priesthood?

A. No.

Q. Is a pastor's recommendation on—or views on positive value in the priesthood a subjective one?

A. Yes.

Q. To your knowledge, do some pastors interpret positive value in the priesthood differently from other pastors?

A. Yes. (A. 115, 116)

* * * * *

Q. [By Union Counsel] When you referred to the many liturgies that go on, you included in this definition, did you not, what is sometimes referred to as paraliturgies?

A. [By Msgr. O'Donnell] Yes.

Q. . . . that is where there is no communion?

A. That is not accurate.

Q. Where am I inaccurate?

A. To answer that question, I would practically have to give you a course in theology. (A. 99, 100)

* * * * *

Despite this searching inquiry, the Labor Board, like the six blind men with the elephant, latched upon the secular aspects of the schools' curricula, and concluded that they were merely "religiously associated" and not "completely religious." The Board summarily ruled that Board intermeddling in Bishop-teacher relations was remote from any constitutional concern.

This clumsy treatment of sensitive religious values put the Board at odds with numerous decisions of this Court. First, such



inquiry into the degree of religion at these institutions violated this Court's prohibition against civil tribunals' delving into religious matters. *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U. S. 696 (1976). As this Court held only a few months ago in *State of New York* v. *Cathedral Academy*, 434 U. S. 125, 133 (1977):

> The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once.

The record below amply demonstrated that the Quigleys are deemed minor seminaries by every conceivable Roman Catholic Church body that could have passed on the issue. (A. 52; Emp. Ex. 8, 9, 10) Yet, the Board insisted on ignoring both the Church and this Court to make its own determination as to just how religious these minor seminaries really are.

Second, this Court has held that despite their very significant secular educational achievement, Church-related elementary and secondary schools were sufficiently religious to warrant First Amendment scrutiny of government contacts with them. *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971); *Meek* v. *Pittenger*, 421 U. S. 349 (1975). The Fort Wayne high schools are indistinguishable from those before this Court in *Lemon* and *Meek*. (A. 170) The Quigleys, as minor seminaries, have an even more sensitive religious role because the sole reason for their existence is to train young men for the priesthood.[12] The Board's

12. The *Archdiocese of Chicago Statement of October 5, 1970* clearly states the role of the Quigleys in training future priests:

> 1. Boys who seem to show the initial signs of vocation [the priesthood] should be helped to recognize this vocation more easily and clearly and to respond to it.
>
> 2. Under the light and guidance of the Holy Spirit, candidates should be helped by their superiors, priests, parents, the parish community and others concerned to respond faithfully to the intentions of Divine Providence.

(Footnote continued on next page.)

decision is clearly erroneous as a matter of fact and is manifestly incorrect as a matter of law under this Court's *Lemon* and *Meek* holdings.

Third, the Board indicated that if the Catholic Church wanted an example of a "completely religious" rather than a "religiously associated" school, it need only look to the institutions involved in two recent Board decisions.[13] *Association of Hebrew Teachers of Metropolitan Detroit*, 210 NLRB No. 132 (1974); *Board of Jewish Education of Washington, D. C.*, 210 NLRB No. 150 (1974). This disparate treatment of religious schools smacks of established churches. If the First Amendment means anything, it means that Government may not "prefer one religion over another." *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1946).

In sum, the Board's jurisdictional standard and application of that standard in this case flagrantly violates the First Amendment. Succinctly, as the AFL-CIO's Amicus Brief in support of the Board quite properly concedes, the Board's jurisdictional

(Footnote continued from preceding page.)

3. Candidates should be helped to live up to their baptismal consecration even more completely and to advance in the spirit of the apostolate.

4. Candidates should be prepared to see the gift of vocation in its real nature and, if lawful authority approves, embrace it freely and gladly.

5. Since the supernatural gift of vocation is based on natural endowments, in the minor seminary the family background of the student as well as his physical, psychological, moral and intellectual qualities should be evaluated.

6. An environment should be created within which the student can grow as a person, as a Christian, as one advancing to priesthood. (Emp. Ex. 5, at 6-7)

13. We fail to divine the Board's conception of religion, but it is readily apparent that conception is narrower than that of the First Amendment. See *Everson* v. *Board of Education*, 330 U. S. 1, 32-33 (1947) (Rutlege, J., dissenting) ("daily religious education commingled with secular is 'religion' within the guaranty's comprehensive scope"). Although what constitutes a religious matter may vary from sect to sect, it certainly includes the sect's governance, preparation of its ministers, worship, teaching of religious doctrine and promulgation of moral standards.



standard "is constitutionally unsound, because that standard necessarily requires the Board to make religious judgments forbidden by the First Amendment." (AFL-CIO Brief Amicus Curiae at 4, n. 1)

## II. Labor Board Regulation of Church-Teacher Relations Impermissibly Entangles the Government in the Church's Schools.

### A. The Adjudication of Church-Teacher Disputes Inevitably Entangles the Board in Religious Matters.

This Court has held that the First Amendment Religion Clauses bar the Government from becoming excessively entangled in the affairs of religious schools. *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971); *Meek* v. *Pittenger*, 421 U. S. 349 (1975). While arising in the state aid cases where the Establishment Clause was of initial concern, the entanglement principle is firmly grounded on the Free Exercise Clause. Government regulation in the aid cases would have insured that public moneys were not spent for proscribed religious purposes, but such regulation, this Court feared, would interfere with religious instruction and practice.[14] The resulting relationship between the

14. Mr. Justice Douglas set forth the First Amendment foundations of the entanglement principle in *Lemon*:

> Intermeddling, to use Madison's word, or "entanglement", to use what was said in *Walz*, has two aspects. The intrusion of government into religious schools through grants, supervision, or surveillance may result in establishment of religion in the constitutional sense when what the State does enthrones a particular sect for overt or subtle propagation of its faith. Those activities of the State may also intrude on the Free Exercise Clause by depriving a teacher, under threats of reprisals, of the right to give sectarian construction or interpretation of, say, history and literature, or to use the teaching of such subjects to inculcate a religions creed or dogma. 403 U. S. at 634 (Douglas, J. concurring).

Mr. Justice Stevens has more recently described the free exercise aspects of entanglement in *Roemer* v. *Board of Public Works of Maryland*, 426 U. S. 736, 775 (1976): "The *disease of entanglement may infect a law discouraging wholesome religious activity* as well as a law encouraging the propagation of a given faith."

Government and the schools, this Court found, was "pregnant with the dangers of excessive government direction of church schools and hence of churches," and the Court held that it could not ignore "the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses." *Lemon* v. *Kurtzman*, 403 U. S. at 620. The Court's worst fears in *Lemon* and *Meek* have been manifest in the Labor Board's nascent but expanding regulation of teachers here.

Application of the National Labor Relations Act to these religion-sensitive employees imposes myriad duties upon the Church and places the Board in the position of arbiter of whether or not the Church has discharged those duties. The Act provides a forum for the protection and adjudication of employee self-interests. 29 U. S. C. Sections 157, *et seq.* The Act establishes standards for employee-employer behavior and elaborate procedures for the selection of union representatives (29 U. S. C. Sections 158, 159), and vests the Board with extensive investigatory powers (29 U. S. C. Section 161) to enforce the ongoing substantive mandates of the Act (29 U. S. C. Section 160). Administrative regulations and a voluminous and evergrowing body of intricate and often contradictory case law impose still more extensive and varied regulation. The regulation ensnares every aspect of the employment relationship. This administrative machinery can be thrown into motion against the Church whenever a disgruntled teacher or his union asserts that Church authorities interfered with rights under the Act.

Application of the Labor Act to religious school teachers has a fundamentally different impact on Church schools than the impact of other general welfare legislation. This Court has held that teachers are in a unique position to influence the religious upbringing of their students. *Lemon* v. *Kurtzman*, 403 U. S. 602, 617-18 (1971). Unlike janitors and similar employees, teachers are "closely associated with" and in truth are the heart of "the educational mission of the nonpublic school." *Wolman*



v. *Walter*, 433 U. S. 229, 244 (1977). Fire inspections, building and zoning regulations have no impact on teachers or religious education other than to ensure safety in the structure where the teaching occurs. Nor do minimum wage legislation or compulsory attendance laws affect or have the potential to affect the actual teaching process and classroom interaction. In marked contrast, the Labor Board regulation at issue here goes to the core of the Church school and has already resulted in the Government directing and influencing religious matters.

The Board concedes that "disputes in parochial schools may well involve issues of religious doctrine." (Pet. App. A at 32a) The paradigm is the unfair labor practice charge. If a bishop were to dismiss a teacher because he advocated contraception in class *and* because he was active in union politics, the teacher and his union would surely cite the bishop before the Board. The Board would just as surely hold that the bishop had violated the law despite the fact that he acted to protect the purity of the Catholic faith. *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26 (1967); *Hugh H. Wilson Corp.* v. *NLRB*, 414 F. 2d 1345, 1353 n. 17 (3d Cir. 1969); *NLRB* v. *Pemback Oil Corp.*, 404 F. 2d 105, 109 (2d Cir. 1968), *vacated on other grounds and remanded*, 395 U. S. 828 (1969). Indeed, the Board has the power to find unfair labor practices *even if the bishop had no antiunion animus* if his action adversely affected union rights under the Act. *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963). The Board could well compel, and indeed in the past has compelled, the Church to reinstate a perceived heretic as a teacher of its youth and future clergy. *See, e.g., Roman Catholic Diocese of Brooklyn*, 222 NLRB No. 156 (1976), *enf. denied on other grounds*, 549 F. 2d 873 (2d Cir. 1977).

Signally, the very schools in this case have been the subject of protracted labor disputes. Three unfair labor practice charges have been filed against the Fort Wayne Diocese for failure to renew teacher contracts. The Diocese contends the contracts

were not renewed for cause. One teacher had included in a student reading list a book by Masters and Johnson containing sexual theories that were contrary to the teachings of the Catholic Church; another refused to structure a religion course as directed by a school principal; and the third had married a divorced Catholic and was no longer in good standing with the Church. (Pet. App. A at 33a-34a) Upon full trial the extended litigation culminated in the Board ordering reinstatement and payment of back wages to the teachers in two of the cases. *Diocese of Fort Wayne South Bend, Inc.*, Nos. 25-CA-7932, 25-CA-7932-2, 25-CA-7932-3 (Region 25) (ALJ opinion filed Feb. 23, 1977), 230 NLRB No. 38 (1977).

Wherever the Board has commenced its regulation, such confrontations have arisen promptly. In *Roman Catholic Diocese of Brooklyn*, 222 NLRB No. 156 (1976), *enf. denied on other grounds*, 549 F. 2d 873 (2d Cir. 1977), a religion teacher on union dues checkoff claimed that a refusal to rehire violated Section 8(a)(3) of the Act. The Board's Administrative Law Judge rejected the claim, finding that the teacher's "lack of respect for traditional Catholic teachings" and public belittling of the sacrament of marriage were sufficient cause to refuse to rehire:

> Early in the academic year 1972-1973 Mirrione one day came to the building in bluejeans. During that same year, according to the very graphic recollection of a religious teacher named Hicks, there were complaints by parents about Mirrione's "lack of respect for . . . traditional Catholic teachings," the "sacraments . . . were never emphasized enough," "the abortion thing was mentioned to me several times."
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> There was a departmental conference of theology teachers also in the spring of 1974, attended by at least one woman teacher from another school. Some participants got the word to Burke that in their opinion Mirrione belittled "the sacramentality of marriage," or otherwise underemphasized its religious aspect as distinguished from the "reality."



> Again Mirrione explained this matter away as no more than a philosophical play on words among the teachers, but who can really pass judgment here? But again, however, it cannot be gainsaid that a question of this kind, in a school of this kind, raises something that the hiring authorities have a right to consider in evaluating an applicant for hire, or for rehire. 222 NLRB at 1066.

Upon review, the Board disagreed and ordered reinstatement. By Board order, a teacher that derogated one of the Roman Catholic Church's Seven Sacraments and other Church teachings may now teach religion to Catholic youth.

Exercising its newly-discovered jurisdiction, the Board has even litigated the religiosity of prayer. In a Gary, Indiana case, the Board charged that the recitation of a prayer entitled "Repent Ye Sinful Children," and a scripture reading from the General Epistle of Saint James, Chapter 4 Verses 1-10, constituted a promise of benefit or threat of reprisal to cease union activities in violation of Section 8(a)(1) of the Act. Only after hearing hundreds of pages of testimony in the course of a trial, did the Board's Administrative Law Judge discharge the complaint. *Andrew G. Grutka, Bishop of the Roman Catholic Diocese of Gary, Indiana*, No. 13-CA-15445 (Region 13) (ALJ opinion filed Jan. 10, 1978) at 17 n. 12. The concerns of entanglement expressed by the Court in the state aid decisions are miniscule compared to the Board's religious incursion in Gary. The fact that such a charge could even be made and incorporated by the Board in an unfair labor practice complaint is, we fear, an ominous harbinger of entanglement to come if this Court sustains the Board here.

The Board's regulation will inevitably alter the religious character of the Church's schools. As the Seventh Circuit so astutely found, to minimize friction between the Church and the Board, prudence dictates that the Bishops tailor their conduct and decisions to "steer far wider of the unlawful zone" of the improper conduct. *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958). If,

for instance, a teacher provides religious instruction contrary to the teachings of the Church one week and the next week gives a fiery pro-union speech, the Bishop may forego his religious obligation to discharge the heretical employee rather than risk a protracted and expensive unfair labor practice proceeding before the Board. Such omni-present Government regulation is precisely the sort of entanglement the Religion Clauses seek to avoid. *See Abington School District* v. *Schempp*, 374 U. S. 203, 289-90 (Brennan, J. concurring) (1963).

Finally, the Board is singularly unsuited to litigating Church-teacher disputes at religious schools. The Board and its Law Judges have no experience with the First Amendment. Witness their insensitive disregard for the Quigleys' religious mission in Chicago, their search for anti-union animus in a prayer in Gary, and their reinstatement of a teacher who belittled the sanctity of marriage in Brooklyn. Moreover, the Board and its Law Judges as administrative fact finders are subject to the most limited judicial review. *Universal Camera* v. *NLRB*, 340 U. S. 474 (1951). While this country has come a long way in erradicating religious discrimination, one need only read the daily paper of Northern Ireland, Lebanon, the Philippines and South Asia to know that religious passions run deep. We do not question the bona fides of Board agents, but we fear, like this Court feared of the teachers in *Lemon*, that they might unwittingly steer the facts of teacher disputes at Catholic schools to meet their own view of the cosmos.

We need not further detail the endless sorts of Church-teacher disputes involving religious issues that will come before the Board if this Court should sustain Labor Board jurisdiction. This Court is well attuned to the panoply of entangling labor disputes that can occur. If the constitutional principles established in *Lemon* and *Meek* are not merely devices for invalidating financial aid programs to needy private schools, those principles require this Court to rescue the Bishops' schools from the perils of Labor Board regulation.



**B. Board Certification and the Orders to Bargain Interfere with the Bishops' Authority to Manage Their Schools Under Church Law.**

Quite apart from the severe constitutional infirmity of unfair labor practice adjudication, there is a more insidious consequence of Board regulation that poses a far greater threat to religious freedom. While Board law and practice may be well suited to industrial or commercial settings, the Board has demonstrated an insensitivity for First Amendment rights as well as the special characteristics of educational institutions. If this Court were to approve Board regulation of the religious school, that insensitivity would be reflected not only in the Board's formal decisions but also in the daily interplay among Board agent, union representative and Bishop. Each decision based on the industrial model, each compromise brokered by a Board agent unschooled in religious concerns will be a "corrosive precedent" from which the next decision or compromise will be made. The cumulative impact of such regulation would be the gradual secularization and restructuring of these religious institutions in the image of the industrial model.

Board certification of a teachers union shifts the balance of authority in the religious school from the Church to the Government. By Canon Law, the bishop is the ultimate repository of authority within the Catholic school. Upon Board certification, the bishops and their administrators must now consult with the lay faculty's Government-endorsed representative on all matters, ranging from wages and hours to course content and curriculum development. The certification immeasurably bolsters the union's bargaining power, placing the Government's imprimatur on the Union's resort to economic warfare and the bishops under a continuing duty to bargain over the terms and conditions of teacher employment. *NLRB* v. *Insurance Agents*, 361 U. S. 477 (1960). While the Board does not formally participate in bargaining negotiations, "the federal statute is the source of power and authority by which any private rights are lost or sacrificed."

*Railway Employers' Dept.* v. *Hanson*, 351 U. S. 225, 232 (1956). This is the heart of the matter. Now the Government, not the Church, is the ultimate arbiter of teacher-labor matters.

The Church does not dispute the abstract proposition that the Board cannot force agreement to a particular Union contract. Rather, the Church urges the Court to look at the realities of bargaining: Government-certified unions restrict the Bishops' ecclesiastical authority to run Church institutions as they see fit. The Church, for example, has long wished to employ exclusively clerical faculty at the Quigleys. If during the course of a collective bargaining agreement the Chicago Bishop should decide to lay off all or some of the Quigley lay faculty and replace them with priests—which under ecclesiastical law he has the right to do—the Union would certainly object and haul the Bishop before the Labor Board and compel him to bargain over his unilateral change in the terms and conditions of employment. And the Board has the power to order the Bishop to reinstate the lay teachers. *Fiberboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964); *NLRB* v. *C. & C. Plywood Corp.*, 385 U. S. 421, 424-25 (1967). Affirmance of the Board here will forever cripple the Bishop's authority to alter the schools in accordance with the Church's evolving views of theology and the World.

Board regulation seriously hampers the Church's obligation to allocate limited financial resources among pastoral concerns. The financial plight of private schools is well known. Nonetheless, the Church may decide to fund other religious endeavors. If the Bishop should decide to close a school to free funds to build a new church, the Bishop would have to bargain with the Union over this allocation of the Church's resources. *Ozark Trailers, Inc.*, 161 NLRB No. 48 (1966). If the Board should find that the Bishop's action constituted bad faith bargaining, it could order the Bishop to reopen the school. *NLRB* v. *Jackson Farmers, Inc.*, 457 F. 2d 516 (10th Cir. 1972) The Government and the Union would be effectively dictating the Church's religious priorities and religious missions.



The Board has intermeddled with Catholic schools in the Diocese of Brooklyn in exactly this fashion. After a bitter five-week strike by a Board-certified Union, parents of students at one high school established their own school for their children independent of the Diocese. *Roman Catholic Diocese of Brooklyn*, 236 NLRB No. 3 (1978). The Union strikers had "behaved in a manner unbecoming professional educators who should teach students by setting a Christian example." *Id.* At their new school, the parents hired more clerics for the faculty and refused to bargain with the Union. *Id.* After a lengthy trial that included the conflicting testimony of a Board canon law expert and a Diocesan canon law expert on questions of how the structure of the Diocese relates to successorship and alter ego liability, the Board ordered the parents to bargain with the Union, utterly frustrating their efforts to educate their children as they saw fit.[15] Such intimate and continuing Government interference with the administration of religious schools is precisely what this Court condemned in *Lemon*, and *Lemon's* entanglement is plainly *de minimis* compared to that found here.

Should this Court affirm the Board, the Church's control of their schools will inevitably be compromised in other respects. Teachers, like lawyers, are professionals specially trained in their fields. Coupled with notions of academic freedom and the natural desire to control every aspect of the classroom, their specialized education compels them to seek a voice in textbook selection, curriculum development and instructional methods—the very

15. The labor litigation spawned by the Board's assertion of jurisdiction over the Brooklyn Diocese is mind-boggling. In 1972, a special task force reported to the Bishop of Brooklyn that the Diocese could no longer afford to operate the Diocese's high schools. Since then, the Diocese has been forced to close two schools and has transferred the operation of some of the schools to independent religious orders and parents organizations, litigating with a Government-certified teachers union every step of the way. *See, e.g., Henry M. Hald High School Association*, 213 NLRB No. 54 (1974); *Henry M. Hald High School Association*, 216 NLRB No. 93 (1975); *Roman Catholic Diocese of Brooklyn*, 222 NLRB No. 156 (1976); *Roman Catholic Diocese of Brooklyn*, 236 NLRB No. 3 (1978).

heart of the practice of religion in the school. M. Moskow, *Teachers and Unions* 2-3 (1966). Indeed, the American Federation of Teachers and the National Education Association take the position that teachers have a right to determine such fundamental matters of education policy. A. Rosenthal, *Pedagogues and Power* 5-6 (1969). To concede this control to a Government-sanctioned union of teachers would deprive the Church of its ultimate authority in these matters.[16]

The bargaining history of public schools removes all doubt that Board-certified unions will demand a right to participate in religious school management. As two experts concluded after empirically studying public school systems across the country:

> The establishment of a collective bargaining relationship also changes the basis of decision-making in a school system. The practical effect of collective bargaining is to grant teachers an increased measure of control over the decisions of management. Collective bargaining creates a presumption in favor of compromise and accommodation which provides teachers with a partial veto over management decisions. Collective bargaining also serves to augment the political and economic power of teachers and to substitute such power for rational persuasion as the basis for teacher participation in decision-making. C. Perry & W. Wildman, *The Impact of Negotiations in Public Education: The Evidence from the Schools* 216 (1970).

Accordingly, once matters of wage policy have been settled, professional teachers unions have leaped into questions of public school management and educational policy.[17]

The experience of private universities under Board rule further confirms this projection. When the Board first asserted jurisdiction over these schools, union representatives, like the Unions here, claimed that they would confine the scope of bargaining to economic issues. Despite these assurances, matters of education policy soon found their way to the bargaining table:

> Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to range of offerings, and range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policies. This transmutation of academic policy into employment terms is not inevitable, but is quite likely to occur. Brown, *Collective Bargaining in Higher Education*, 67 Mich. L. Rev. 1067, 1075 (1969).

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16. Some, in fact, have sought to elevate academic freedom to the status of a constitutional right. *See* Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. Pa. L. Rev. 1293 (1976). At every opportunity, union leaders proclaim that "class size, number of classes taught, curriculum, hiring standards, textbooks and supplies, extra curricular activities—in fact anything having to do with the operation of the school—is a matter for professional concern and should thus be subject to collective bargaining." *E.g.*, Cogen, *Collective Negotiations in Public Education* in Sorry—No Government Today 141, 148 (R. Walsh ed. 1969); Ryor, *The Uses of Teacher Power* Today's Education 5 (Nov.-Dec. 1975).

Ominously, the American Federation of Teachers (AFT) and the National Education Association (NEA) (the national parent of the Quigley union) have consistently adopted positions that reflect hostility to private education. See the testimony of George A. Humphrey on behalf of the AFT before the Senate Committee on Finance on proposed tuition tax credit legislation January 19, 1978 and the testimony of John Ryor on behalf of the NEA before the House Ways and Means Committee, *Tax Treatment of Tuition Expenses: Hearings Before the House Ways and Means Comm.*, 95th Cong., 2d Sess. 97-111 (1978).

17. This Court and the Board have broadly construed an employer's duty to bargain under the National Labor Relations Act. Following its practice in other areas, in the case of teacher unions the Board will look to the bargaining history in the industry. *Fiberboard Paper Products Corp.* v. *NLRB*, 137 U. S. 203, 211 (1964). The bargaining history of teachers in the public sector clearly indicates that administrative bodies, often operating under statutes that impose a more restrictive duty to bargain than the federal law, sanction teacher bargaining over broad educational policy matters. *See Clark City School District* v. *Local Gov't Employee Management Relations Board*, 530 P. 2d 114 (Nev. 1974) and *National Education Association of Shawnee Mission, Inc.* v. *Board of Education*, 212 Kan. 741, 512 P. 2d 426 (1973) (textbook selection, teacher preparation time, class size, student discipline, teacher performance, school calendar, and teacher load are mandatory subjects of bargaining).

*See* C. Perry and W. Wildman, *The Impact of Negotiations in Public Education: The Evidence from the Schools* (1970).

Subsequent bargaining history has proved this prophecy true, and there can be no assurance here that Unions under Labor Board tutelage will not encroach upon the prerogatives of the Church in similar fashion. *See* Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U. C. L. A. L. Rev. 63, 80 (1973).

In sum, the cumulative impact of Labor Board regulation threatens the very religious foundation of Church schools. No longer is the Church the ultimate repository of authority. Government-certified unions will now play a major role in the management of Roman Catholic schools. Such "active involvement of the sovereign in religious activity" is patently unconstitutional. *Lemon* v. *Kurtzman*, 403 U. S. 602, 603 (1971).

### C. No Interest Justifies the Board's Incursion Into Private Religious Schools.

Since *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925) and *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), this Court has held that parents have a fundamental constitutional right to send their children to private religious schools. The right testifies to the special role of the family in our society and the importance of private education in our history. The right constitutionalizes Madison's view that a strong and free society is founded upon religious, as well as economic and political, diversity. *The Federalists* No. 51 (Heritage ed. 1945) at 350. From the Nation's founding through de Tocqueville and into this Century, private religious schools educated the youth of our country. 1 *Democracy in America* 306 n. 4 (Knopf ed. 1966). Today, private religious schools in many parts of the country and, in particular, in urban areas where public education has broken down provide the best education available to our young people. President's Panel on Education, Final Report, 5-10 (1972).[18]

18. *Reprinted in* Hearings on H. R. 1614 and Other Proposals before the House Committee on Ways and Means, 92d Cong., 2d Sess. 118-123 (1972).



The Board's assertion of jurisdiction over Church schools has a cumulative institutional impact that harms the Church beyond what may be suffered as a result of any single Board incursion into those schools. The Board is a new presence in the schools that lurks behind all faculty matters. The Board-imposed industrial model, with built in tension between management and labor, will gradually transform the relationship between the Bishop and faculty from one of cooperation to one of confrontation. The final arbiter of the confrontations will not be the Church, but a Government body, and the criteria for the Government's decisions will not be taken from Catholic doctrine and tradition but from Federal law and practice. Secular characteristics such as personal economic self-interest, rather than personal sacrifice for an otherworldly cause, will gradually engulf and efface the religious stamp of these institutions. What is at stake in this case is Catholic education "as it exists in the United States today." *Wisconsin* v. *Yoder*, 406 U. S. 205, 209 (1972).

These considerations apply *a fortiori* to the Quigley seminaries. At least since the time of Saint Vincent DePaul in 1642, minor seminaries, such as the Quigleys, have played a crucial role in the education of Catholic clergy. (A. 24) As a matter of Church law and tradition, dating from the earliest days of Christianity, secular influences could only be introduced to the seminary at the bishop's behest. (A. 38, 40-43, 49-50) If bishops are unable to alter the seminary regimen to reflect changing religious perceptions, then the Church has lost all control over priestly education. And if bishops are unable to alter seminaries to make them more attractive to Catholic young men in a changing world, the Church's ability to propagate and sustain the Catholic Faith will be severely and irreparably impaired. Yet, the Labor Board's ruling that the Quigleys are not minor seminaries because they do not fit some undisclosed model against which the Board has measured them has precisely this effect.

The Board seeks justification for this unprecedented intrusion into the precincts of the Church in the Commerce Clause and the

National Labor Relations Act's interest in the free flow of commerce. (Pet. Brief at 36)[19] But "no showing merely of a rational relationship to colorable state interest" saves a law or practice that contravenes the First Amendment. *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963); *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 774 (1973). Even interests at the very apex of the state function do not sustain a law that offends the Constitution. *Wisconsin* v. *Yoder*, 406 U. S. 205, 213 (1972). Nor does it suffice to argue that the Board trenches upon no religious belief, though it surely has here, because there "are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Wisconsin* v. *Yoder*, 406 U. S. 205, 220 (1972).

The First Amendment is an affirmative limitation upon Congress' commerce power, and under the principles of this Court's recent decision in *National League of Cities* v. *Usery*, 426 U. S.

19. The Board's reliance on *Associated Press* v. *NLRB*, 301 U. S. 103 (1937) is wholly misplaced. First, unlike *Associated Press*, the Board's action here has already interfered with the Church's schools. The Board's jurisdictional inquiry, the adjudication of the Fort Wayne unfair labor practice complaints, and the Board's order to the Church to share its authority with a Government-certified union attests to that.

Second, the Press and the Church are two entirely different institutions protected by two entirely different constitutional rights. The Labor Board does not interfere with the "impartial distribution of news" 301 U. S. at 133, while, as we demonstrate, Labor Board Supervision of Church-teacher relations at Church schools "is fraught with the sort of entanglement that the Constitution forbids". *Lemon* v. *Kurtzman*, 403 U. S. 602, 620 (1971).

The Board's suggestion that the exemption of Church school teachers from the Act would violate the Establishment Clause is likewise without merit. (Pet. Brief at 46) The Religion Clauses guarantee "a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference." *Walz* v. *Tax Commission*, 397 U. S. 664, 669 (1970). The exclusion of private religious schools from the Act "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religions with secular institutions which is the object of the Establishment Clause to forestall." *Sherbert* v. *Verner*, 374 U. S. 389, 409 (1963).



833 (1976), the Amendment's sweep must prevail here. *Usery* held that the Tenth Amendment, like the First, is an affirmative limitation upon the Commerce Clause and barred the Congress from applying the Fair Labor Standards Act to state and local government employees. Application of the FSLA to the States, the Court reasoned, would impose substantial costs upon the States, interfere with the delivery of State services, and impair the States' ability to function effectively in the Federal system. Application of the National Labor Relations Act here would have an equally drastic impact upon religious education because of its interference with religious practice at the schools. Madison's freedom-giving religious diversity, like his Federal system in *Usery*, would be dealt a leveling blow from which it may never recover.

The Board, moreover, has made no showing—and none can be made—that the exemption of Church schools from the Act poses a clear and present danger to the free flow of commerce. These schools have no history of labor discord and strife. Indeed, public school teachers, some 3,000,000 in number, constitute 97% of the teachers in this country,[20] and Congress has never sought to apply the Act to these employees. If public school teachers in Congress' judgment pose no threat to commerce, then we fail to comprehend how the relatively small number of church school teachers who are scattered across the country can threaten industrial peace.

The Board's interest in regulating the Quigleys is even more remote and strained. There are only 87 minor seminaries in the United States, with a total enrollment of 6,928 students. (Emp. Ex. 10) The Quigleys account for 1,316 of these seminarians—or slightly more than one-fifth. (Tr. 421, 653-54) The combined budgets of the Quigleys allocate a spare $65,000 to out of state purchases. (Emp. Exs. 72, 73) Extrapolating these figures to the class as a whole, minor seminaries nationwide

20. *Compare* United States Bureau of the Census, *Public Employment in 1976*, No. 1 Table 3 at 9 *with The Official Catholic Directory* 1-2 (1977).

spend little more than $300,000 on interstate purchases. Even the most violent labor strife on such a scale would not justify the Board's unprecedented intrusion into the affairs of the Church in this case. *See generally Cooper* v. *Aaron*, 358 U. S. 1, 16 (1958) (law and order are not to be preserved by denying citizens fundamental rights).

Further, the Chicago Bishop and the Fort Wayne Diocese have their own established procedures for resolving Church-teacher disputes under teacher contracts. In Chicago, the Archdiocesan Board of Conciliation and Arbitration is empowered to hear all teacher disputes and grievances (A. 150-152), and in Fort Wayne terminated teachers have the right to a full hearing before the Diocesan Board of Education. (A. 193) There is no evidence that these procedures do not serve the public's interest in industrial peace. If teachers should circumvent them, the threat to interstate commerce is certainly no greater than and indeed of no significance compared to the peril to commerce when Board-sanctioned bargaining breaks down (as the recent United Mine Workers strike attests).

In sum, however broadly we define permitted regulation and however narrowly we draw the First Amendment guarantees, neither the letter nor the spirit nor the history of the Religion Clauses can legitimately be read to permit the government to so interfere in religious institutions so as to direct or influence religious matters. Any fair reading of the very brief history of the Board and the religious school yields a single, emphatic conclusion. This regulatory Agency has demonstrated the propensity to interfere and has interfered with religion. Accordingly, this Court should affirm the Seventh Circuit and hold that Labor Board jurisdiction over religious schools violates the First Amendment.



## III. Congress Never Intended the Act to Apply to Religious Educational Institutions

We believe it is plain that the First Amendment bars the NLRB from asserting jurisdiction over private religious educational institutions. But this Court need not reach this constitutional issue because the National Labor Relations Act does not apply to private religious schools. *Ashwander* v. *T. V. A.*, 297 U. S. 288 (1936). When Congress passed the Act in 1935, virtually all teachers at Church schools were nuns, brothers and priests.[21] Disputes between these religious teachers and their superiors were, as they are today, beyond the jurisdiction of civil tribunals, and Congress could never have intended to apply the Act to religious school teachers. *See Gonzalez* v. *Roman Catholic Archbishop*, 280 U. S. 1 (1929); *Granfield* v. *Catholic University of America*, 530 F. 2d 1035 (D. C. Cir. 1976) *cert. denied*, 429 U. S. 821; *McClure* v. *Salvation Army*, 460 F. 2d 553 (5th Cir. 1972), *cert. denied*, 409 U. S. 896.

*McCulloch* v. *Sociedad National De Marineros de Honduras*, 372 U. S. 10 (1963) is controlling. In *McCulloch*, the Board sought to apply the Act to owners of foreign ships operating in United States waters. Even though this class of employers fell within the literal terms of the Act, the Court held that Congress did not intend for the Board to inquire into the "internal discipline and order of all foreign vessels:"

> We therefore conclude, as we did in *Benz*, that for us to sanction the exercise of local sovereignty under such conditions in this "delicate field of international relations *there must be present the affirmative intention of the Congress clearly expressed*". 353 U. S., at 147. Since neither we nor

21. When Congress adopted the Wagner Act in 1935, the greater majority, 88 percent, of the teachers at parochial schools were nuns, brothers, and priests. *Franciscan Almanac* 203 (St. Anthony Guild 1937). When Congress enacted the Taft-Hartley Amendments in 1947, 84 percent of these teachers were religious. *National Catholic Almanac* 368 (1950). *See N. McCluskey, Catholic Education Faces Its Future* 106-18 (1969).

> the parties are able to find any such clear expression, we hold that the Board was without jurisdiction to order the election. (Emphasis supplied.) 372 U. S. at 21-22.

This reasoning has special force when the Board's claimed authority collides with First Amendment freedoms. *NLRB* v. *Fruit & Vegetable Packers & Warehouseman Local 760,* 377 U. S. 58, 63 (1964). *See also Benz* v. *Compania Noveria Hidalgo,* 353 U. S. 138 (1957); *TWA* v. *Hardison,* 432 U. S. 63 (1978).

The Act's legislative history brings this case squarely within the *McCulloch* rule. There is no evidence that Congress intended the Act to apply to church schools in 1935. The 1947 Taft-Hartley Amendments, in fact, suggest that Congress disavowed any such application of the statute. In rejecting an amendment in the House to exempt religious charitable, scientific, literary and educational organizations, the Conference Committee Report explained that such an amendment was unnecessary because the Board had not asserted jurisdiction over strictly religious and charitable matters:

> The other nonprofit organizations excluded under the House bill are specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32 (1947).

This Court has affirmed Congress' view of the Board's jurisdiction, *Office Employees International Union* v. *NLRB,* 353 U. S. 313, 318-19 (1957) and "it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts." *NLRB* v. *Gullet Gin Co.,* 340 U. S. 361, 366 (1951). In short, there is simply no "affirmative intention of Congress clearly expressed" that the



Board could or should assert jurisdiction over church school teachers.[22]

The Board's own prior actions fortify this analysis. For the first 40 years of its history the Board saw no Congressional mandate to assert jurisdiction over religious schools, first asserting jurisdiction over Roman Catholic schools in the fall of 1974. *Henry M. Hald High School Association,* 213 NLRB No. 54 (1974). The Board's contemporaneous and at least until 1974 well settled construction of the Act is persuasive evidence of Congress' intent to exempt these schools from the federal regulatory scheme. *See General Electric* v. *Gilbert,* 429 U. S. 125 (1976) (contemporaneous administrative construction prevails over subsequent construction).

Accordingly, lacking an unequivocal and affirmative expression of Congressional intent, this Court should refuse to inter-

22. The 1947 Taft-Hartley Amendments did exempt nonprofit hospitals. Labor Management Relations Act, Title I, § 101, 61 Stat. 137 (1947) (current version at 29 U. S. C. § 152(2) (Supp. V 1975)). The exemption was created to assuage one senator's uneasiness regarding the then pervasive perception that the hospitals did not "affect commerce" within the meaning of the NLRA. 93 Cong. Rec. 5129-5130 (1947). *See* H. R. Rep. No. 245, 80th Cong., 1st Sess. 12 (1947). In 1974, Congress removed the hospital exemption primarily in response to the astronomical growth of the hospital industry. The Labor Management Reporting and Disclosure Act of 1974, Pub. L. No. 93-360, 88 Stat. 397. 120 Cong. Rec. 12937-12938, 12955-12957 (1974) (remarks of Senators Williams, and Cranston). *See Proposed Extension of NLRA to Nonprofit Hospital Employees: Hearings on H. R. 11357 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor,* 92d Cong., 1st and 2d Sess., 1-4 (1971) (staff analysis). The Board did not assert jurisdiction over the Church's schools until after the passage of the 1974 amendments.

Reading the Act's legislative history most favorably to the Board, the history is at best ambiguous and is not the "affirmative intention of the Congress clearly expressed" required by the *McCulloch* rule. When Congress enacted the statute in 1935, religious faculty ran the Church's schools and church-teacher disputes were beyond the pale of civil authority. Accordingly, we respectfully submit that *NLRB* v. *Wentworth Institute,* 515 F. 2d 550 (1st Cir. 1975), relied upon by the Board and the Seventh Circuit below, was wrongly decided, at least as it construes congressional intent with respect to religious schools.

pret the National Labor Relations Act to apply to the church schools.

## CONCLUSION.

We respectfully submit that this Court should affirm the decision of the Seventh Circuit Court of Appeals and hold that the Labor Board's assertion of jurisdiction over the Quigley minor seminaries and Fort Wayne Catholic high schools violates the First Amendment. We also submit that this Court should affirm the Seventh Circuit on the separate and independent ground that Congress did not intend the National Labor Relations Act to apply to religious schools.

Respectfully submitted,

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